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07-121

FILED
OCT 26 2007

In The
Supreme Court of the United States

LESLIE VALERIE MATLAW
(*dba* LESLIE V. MATLAW, P.C.),

Petitioner,

v.

U.S. MAGISTRATE JUDGE JEFFREY COLE (NORTHERN DISTRICT OF ILLINOIS),

Respondent.

Case Number **07 - 121**
(on Petition for *Certiorari* to the Seventh Circuit)

PETITION FOR REHEARING

Leslie Valerie Matlaw
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****N.b.,*** Petitioner is an attorney not admitted to this Court's Bar and filed the Petition *pro se*
* ***Counsel of Record***

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The precise contours of federal appellate jurisdiction may have shifted s[illegible]what since 1948, but one thing hasn't change[illegible] a lawyer's professional reputation is still his or her most precious asset. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 413 (1990) (*Stevens, J. concurring & dissenting in part*).

Attorneys' renown for integrity, thoroughness, and competence is of equally-paramount importance to the public. *FDIC v. Tefken Construction & Installation Co.*, 847 F.2d 440, 444 (7th Cir. 1988). Scathing judicial criticism immediately damages that hard-won honor. *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866, 878 (5th Cir. 1988). Once chastising decisions are made public, those legally-cognizable injuries' permanence and severity is perpetuated. *U.S. v. Isgro*, 974 F.2d 1091, 1099 (9th Cir. 1992).

Orders making explicit factual findings casting aspersions on a lawyer's integrity or competence are widely viewed as public reprimands, *Bank of Nova Scotia v. U.S.*, 487 U.S. 250, 263 (1988), but the Circuits are deeply split over whether they constitute an appealable sanction. *See*, comprehensive caselaw roundup in *Butler v. Biocore Medical Technologies, Inc.*, 348 F.3d at 1167-69 (decrying "form over substance" within the four-way Circuit Split presented by the instant Petition). The dilemma continues to worsen as successive decisions align the Circuits into their respective camps[1]; meanwhile,

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[1] *E.g., "NEVER"* (**Seventh Circuit** only; *see Bolte v. Home Insurance Co.*, 744 F.2d 572 (7th Cir. 1984) and its progeny) (hereafter, "Bolte"); two distinct variants of "SOMETIMES"

the Eighth and Sixth Circuits have declined to rule on the instant Question Presented. *Baker Group, L.C. v. Burlington Northern and Santa Fe Railway Co.*, 451 F.3d 484, 491-92 (8th Cir. 2006) and *In re Harris*, 51 Fed. Appx. 955-956.

This unsettled issue has been further exacerbated

[*e.g., "ONLY IF THE ORDER'S CRITICISM IS INTENDED TO BE A FORMAL JUDICIAL ACTION IN AN ATTORNEY DISCIPLINARY PROCEEDING"* (**Federal Circuit** only; *compare, Precision Specialty Metals Inc. v. U.S.*, 315 F.3d 1346 (Fed. Cir. 2003) ("Precision Steel") *with* the Federal Circuit's post-Instant Petition modification of that holding in *Nisus Corp. v. Perma-Chink Systems, Inc.*, 497 F.3d 1316, 1320 (Fed. Cir. **August 13, 2007**) ("Perma-Chink") as contrasted to *"ONLY IF THE CRITICISM IS INTENDED AS A REPRIMAND"* (**First** and **Third Circuits**, *e.g., In re Williams*, 156 F.3d 86 (1st Cir. 1998) and *Bowers v. National Collegiate Athletic Ass'n*, 475 F.3d 524 (3d Cir. 2007), respectively]; or "ALWAYS" (**Fifth Circuit**; *e.g., Walker v. City of Mesquite*, 129 F.3d 831 (5th Cir. 1997); **Ninth Circuit**; *e.g. U.S. v. Talao*, 222 F.3d 1133 (9th Cir. 2000); **Tenth Circuit**; *n.b.*, modified its position in *Butler v. Biocore*, 348 F.3d 1163 (10th Cir. 2003) (in apparent response to inequities presented in the fallout leading to filing of the *English v. Vazquez* Petition for *Certiorari*, No. 03-735, *denied* at 540 U.S. 1150 (2004)) and the **D.C. Circuit**; *e.g., Sullivan v. Committee on Admissions and Grievances of the U.S. District Court for the District of Columbia*, 395 F.2d 954 (D.C. Cir. 1967) ("In re Sullivan") and its progeny. The **Sixth** and **Eighth Circuits** have declined to rule lately on the Question Presented. *See, In re Harris*, 51 Fed. Appx. 952 (6th Cir. 2002) (*unpub'd*), respectively and *Baker Group, L.C. v. Burlington Northern and Santa Fe Railway. Co.*, 451 F.3d 484 (8th Cir. 2006) ("Baker") (suggesting it might now favor *Bolte's* "NEVER" rule, *id.* at 491; *compare Perkins v. General Motors Corp., Inc.*, 965 F.2d 597, 599-600 (8th Cir. 1992) ("ALWAYS").

by State Supreme Court rulings relying on guidance from the unharmonized federal bench. In Oklahoma, discrediting sanctions are never appealable, *Cities Service Co. v. Gulf Oil Corp.*, 976 P.2d 545, 547 (Ok. 1999), but Connecticut's Supreme Court has since announced the opposite rule. *State v. Perez*, 885 A.2d 178, 187-190 (Conn. 2005) (*citing Walker v. City of Mesquite*, 129 F.3d 831, 832-33 (5th Cir. 1997), *U.S. v. Talao*, 222 F.3d 1133, 1138 (9th Cir. 2000), *and In re Sullivan*, 395 F.2d 954, 956 (D.C. Cir. 1967).

Germane to this Petition for Rehearing, *see* Rule 44, is that two weeks after the instant Petition's filing, the Federal Circuit narrowed the path for anyone seeking to appeal "discrediting sanctions" while seeming to widen the courthouse door where facts and circumstances like those in the instant case are present. *Perma-Chink*, 497 F.3d at 1320-21 (Fed. Cir. 2007) (*citing* to the case at bar, *Seymour v. Hug* (*Appeal of Matlaw*), 485 F.3d 926, 929 (7th Cir.2007)).

The instant Petition is one of several seeking review for variants of the Question Presented (*e.g.*, Number 03-735, *U.S. v. Gonzales*, 540 U.S. 1150 (2004) *cert. denied sub nom English v. Vasquez*). With profound respect for This Court's extraordinarily-complex and ever-increasing docket, its discretionary declination of particular issues in no way diminishes their importance.

As corroborated by noted Counsel comprehensively-versed in Supreme Court practice, sanctioning a party's lawyer in a still-pending case has profound implications for the judicial system and attorney-client relationships[2]. *Compare Amici* National

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[2] Nothing in the language or history of Section 1291 forbids

attorney appeals of sanctions, monetary or otherwise, as *Bolte* itself acknowledged. *Id.* at 573. Courts should not be "inclined to ignore the plain text of [a] statute" where the Circuits are split. *Winkelman v. Parma City School District*, ___ U.S. ___, 127 S.Ct. 1994, 2003 (*decided* May 21, 2007) (roundly chiding accusations that Petitioners "knitted together" disparate provisions when the statutory scheme as a whole was at issue and finding that the suggested parsing of inextricably-entwined procedural and substantive rights would deprive aggrieved parties otherwise possessed of standing of a remedy and create readily-apparent potential for injustice, *id.* at 2000, 2002, 2004-5).

Several Courts have reiterated the prudential concerns *Bolte* identified (*e.g.*, Congress could not have intended to allow "a breathtaking expansion" of attorney appeals of non-monetary sanctions, *id.* at 573). Yet the anticipated flood of such appeals has not materialized, (*see* the instant Petition at 16-17), and for good reason: the very real possibility of sanctions' affirmance makes only viable appeals by rational attorneys worth the risk of their proceeding outside of the contours of the Client representation to seek an as-of-right correction on the merits of their alleged misconduct (as opposed to Petitioning for the extraordinary but highly-unlikely remedy of having the comments stricken pursuant to a merely-discretionary Writ of *Mandamus*). *Accord, Williams v. U.S.*, 158 F.3d at 51 (Lynch, J., *dissenting from denial of reh'g en banc*).

Prudential limits on such appeals may have stemmed some of the "tide" of potentially-unwarranted cases, but they have imposed unanticipated harms upon the judicial process. As detailed more fully in the instant Petition, the mere threat of sanctions creates an irreconcilable conflict between attorneys and their Clients, who thereby incur separate interests in the underlying lawsuit's outcome (aptly-termed "dual-agency involvement"). Geoffrey Miller, *Some Agency Problems in Settlement*, 17 Journal of Legal Studies 189 (1987).

Brief In Support[3] of Thomas English's *Certiorari* Petition[4] *with* Akin, Gump's Pre-"Long Conference" List of Petitions to Watch[5]. Notwithstanding Brief in Opposition[6] assertions, most of the Circuits have examined the Question Presented in great detail. Non-party opponents' suggestion that judicial resources (of This Court, ten federal Circuits, and two state Supreme Courts) have been repeatedly squandered over a "no public importance" question is, at best, troubling.

In Circuits where an attorney's right of appeal over discrediting sanctions is curtailed or denied outright,

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[3] 2003 WL 23146427 at *7-8, *2 ("more than a personal miscarriage of justice . . . [denial of appellate standing is a nightmare] feared by all attorneys practicing before federal courts").

[4] 2003 WL 22812425.

[5] *See* entry of 9/21/07 (12:15 PM) on www.SCOTUSblog.com, now directly-accessible only by searching by the "Archives" section, where the post is still actively-cached. Ready access is offered (with apologies for potentially-irksome material at the alternate citation below) *via* the Criminal Justice Legal Foundation website's direct link to the cited page (which in turn posts PDFs of the instant *Certiorari* Petition and Brief in Opposition):

WWW.crimeandconsequences.com/2007/09/the_long_conference.html

[6] With all due respect to non-party Defendants below, no Reply was filed to their Brief which appeared to be severely Rule non-compliant. Yet even absent a Reply, This Court may take judicial notice that in deciding the appeal based upon 28 U.S.C.

judges and administrative adjudicators enjoy an unlimited license to restrain attorneys' services on their Clients' behalf, *Cities Service Co. v. Gulf Oil Corp.*, 976 P.2d at 551 -- but to what end? Judicially-applied tarnish on a zealous advocate's record can never be erased absent appeal, the sole but risky mechanism to fully address misconduct findings. *Williams v. U.S*, 158 F.3d 50 (1st Cir. 1998) (Lynch, J., *dissent*). *Compare, Cheng v. GAF Corp*, 713 F.2d at 889-90 (affirming sanctions and denying *Mandamus*).

The Federal Circuit's decision which has been issued in the period between the filing and denial of the instant Petition has further confounded matters.

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§1291's "prudential limits" as set forth in *Bolte*, the Seventh Circuit demonstrably rejected Defendants' far more readily-resolved procedural arguments.

More importantly, a discretionary grant of *Mandamus* is no substitute for an appeal as-of-right (here, that extraordinary relief was available only from the same Court making "luminously clear" its desire that the case be "at an end." *Compare*, **Appendices A** at 9 [7th Cir. Decision] *and* **B** at 12 [Doc. 154, Final Settlement Order in *Seymour v. Hug*, Case Number 04-C-2041 (N.D. Ill.) *with Perkins v. General Motors Corp., Inc.*, 965 F.2d 597, 599-600 (8th Cir. 1992), *cert. denied* 506 U.S. 1020 (1992) ("District court had no duty to lift the sanctions [but because its] order is appealable, . . . an adequate remedy [exists]. [An attorney] unable to appeal a sanction order after the underlying case has been settled, [is left with] . . . no avenue of challenging the sanction order and [a] personal conflict") (therein *citing Cheng v. GAF Corp.*, 713 F.2d 886 (2d Cir. 1983) (*affirmance on other grounds after remand*, 747 F.2d 97 (2d Cir. 1984), *vacated sub nom GAF Corp. v. Cheng*, 472 U.S. 1023 (1985)).

Perma-Chink, 497 F.3d 1316 (Fed. Cir. 2007).

For starters, all of the Circuits examining the Question Presented have done so on a fact-specific, case-by-case basis, apparently under the theory that no controlling law has issued from This Court. But *Perma-Chink* cited to a string of cases from the turn of the century (as well as two of more recent vintage) for the proposition that "an attorney who is held in contempt *or otherwise sanctioned* by the court in the course of litigation may appeal from the order imposing sanctions, *either immediately or as part of the final judgment in the underlying case.*" *Id.* at 1319 (*n.b.*, West headnote 3) (*citing seven U.S. Supreme Court cases;* also note, *emphasis added*). If the Federal Circuit is correct that this issue has already been resolved for the Circuits below, its ruling would appear to either moot the Question Presented (albeit in the wrong forum) and to demonstrate the Circuits' uniform need for more specific explication of This Court's prior rulings, as none of those courts seem to have perceived the applicability of the cases cited by *Perma-Chink*.

Yet *Perma-Chink* did not dispose of the Question Presented on those grounds; rather, the Federal Circuit continued with a fact-specific jurisdictional analysis which proceeded much along the same lines as all of the caselaw to date[7]. On this basis alone,

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[7] *Perma-Chink's* suggestion that *Bolte's* "slippery slope" argument is still amply-justified by a potentially-unlimited number of similar appeals filed by any kind of claimant (*e.g.*, for findings that witnesses were deemed to fall into the

Petitioner is reluctant to conclude that *Perma-Chink's* cited cases are controlling; the bench and bar alike would be far better-assured by This Court's own explication of the wholly-new quandary posed by the Federal Circuit's unique analysis. Is appealability of discrediting sanctions a settled issue or not? Only This Court can resolve that question (which was recognizably-justiciable as of the filing of the Instant Petition, but by virtue of the Federal Circuit's intervening decisionmaking, *n.b.*, Rule 44, it has become so fulsomely-ripe as to beg for a basket into which it may fall).

As detailed in Petition #07-121, the current Circuit split requires non-monetarily sanctioned lawyers to sacrifice their own rights and remedies for those of their Clients, despite such sanctions necessarily creating irreconcilable representational conflicts. For the foregoing reasons, Petitioner respectfully requests rehearing of her *Certiorari* Petition denied on October 1st, 2007.

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less-than-sufficiently-credible end of the spectrum, *id.* at 1320-21), would seem to ignore that the nature of the criticism asserted by Respondent herein (*sua sponte* findings of "fraud" and "breach") would constitute perjury, for which non-attorney potential claimants would likewise be entitled to a hearing. Moreover, the harms lumped together in *Perma-Chink* to bolster a "floodgates" rationale are recognizably-distinct: unlike private citizens (whose testimony may not even be voluntary, much less fully fleshed-out or completely-accurate, for numerous reasons), lawyers are fiduciaries for the public trust who have tangible interests (e.g., "money or reputation or liberty," *In re Smith*, 964 F.2d 636, 673 (7th Cir. 1992); *accord*, *Bolte* at 573) which are justiciable under Article III, if not Section 1291.

Respectfully Submitted,

Pro Se Petitioner Leslie Valerie Matlaw,
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CERTIFICATE OF COMPLIANCE WITH SUPREME COURT RULE 44(2)

No. 07-121

PETITIONER Leslie Valerie Matlaw,
d/b/a Leslie V. Matlaw, P.C.
v.
RESPONDENT v. Magistrate Judge
Jeffrey Cole (Northern District of Illinois)

As required by Supreme Court Rule 44(2), I certify that the attached Petition for Rehearing is restricted to the following grounds: an intervening circumstance (The Federal Circuit's new explication of the same issue on appeal) having a susbtatial and potentially controling effect AND to other grounds not previously presented (distinction between available remedies e.g., discretionary Mandamus and of-right appeal). Petitioner certifies that this pleading is restricted to these grounds and is being propounded in good faith and not for the purpose of delay or inconvenience. I declare under penalty of perjury that the foregoing is true and correct. **Executed on October 25, 2007:**

Leslie V. Matlaw

Leslie Valerie Matlaw, Pro Se Petitioner herein

NOTARY PUBLIC:

B Anderson

"OFFICIAL SEAL"
B. Anderson
Notary Public, State of Illinois
My Commission Exp. 05/05/2010